

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - X
3 YASER ESAM HAMDI AND ESAM :
4 FOUAD HAMDI, AS NEXT FRIEND :
5 OF YASER ESAM HAMDI, : No. 03-6696
6 Petitioners :
7 v. :
8 DONALD RUMSFELD, SECRETARY OF :
9 DEFENSE, ET AL., :
10 Respondents. :
11 - - - - - X
12 Washington, D.C.
13 Wednesday, April 28, 2004
14 The above-entitled matter came for oral
15 argument before the Supreme Court of the United
16 States at 10:19 a.m.
17 APPEARANCES:
18 FRANK W. DUNHAM, JR., Alexandria, Virginia; on
19 behalf of the Petitioners.
20 PAUL D. CLEMENT, Deputy Solicitor General,
21 Department of Justice, Washington, D.C., on
22 behalf of Respondent.
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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We'll argument
3 first this morning in number 03-6696, Yaser Esam
4 Hamdi vs. Donald Rumsfeld. Mr. Dunham.

5 ORAL ARGUMENT OF FRANK W. DUNHAM, JR.

6 ON BEHALF OF PEITIONERS

7 MR. DUNHAM: Mr. Chief Justice, and may it
8 please the Court:

9 Petitioner Hamdi is a citizen who has been
10 held over two years in the United States with no
11 opportunity to be heard as to the facts on which his
12 detention is based. Mr. Hamdi makes two claims.
13 First, the Fourth Circuit wrongly prevented Hamdi in
14 this habeas proceeding from being heard as to the
15 facts of the case on grounds that allowing him to be
16 heard would interfere with executive power.

17 Second, that the Fourth Circuit erred in
18 finding even on the one-sided record that's before
19 this Court that his detention is authorized by law.
20 The historical core of habeas corpus is to challenge
21 extrajudicial executive detention. It cannot be a
22 violation of the separation of powers for an Article
23 III court to perform its judicial function of inquiry
24 into long-term, indefinite detention of a citizen in
25 a habeas corpus proceeding.

1 Quoting from INS v. St. Cyr, at its
2 historical core, the writ of habeas corpus has served
3 as a means of reviewing the legality of executive
4 detention and it is in that context that its
5 protections have been strongest.

6 QUESTION: Do we have precedents for
7 applying the writ in wartime situations to enemy
8 combatants?

9 MR. DUNHAM: For aliens, yes. And in
10 Quirin --

11 QUESTION: But for a citizen who turns out
12 to be an enemy combatant?

13 MR. DUNHAM: There are two --

14 QUESTION: What precedents do we look to?

15 MR. DUNHAM: There are only two precedents
16 that I'm aware of, Justice O'Connor. The first is
17 the treatment of the American citizen saboteur spy in
18 Ex parte Quirin, and the other is Mr. Territo, in In
19 re Territo, which was a Ninth Circuit case. It is
20 not a case coming out of this Court.

21 In our view, first off, in Territo, the ,
22 -- he was not an enemy combatant. He was called a
23 prisoner of war in that case, but in Territo, there
24 was a full hearing by the district judge. Territo
25 was claiming that he was not a prisoner of war, that

1 he was forced to serve. That he was an American
2 citizen. That he had a right to have it determined
3 that he was not a voluntary combatant.

4 QUESTION: That's not the complaint, or
5 the allegation here, is it?

6 MR. DUNHAM: The allegation here is that,
7 as I understand it, is that Mr. Hamdi is an enemy
8 combatant, whatever that means. We don't find it
9 defined in any case. We don't find it defined in any
10 statute, and it hasn't been defined by regulation or
11 by anything that's been filed in this case.

12 QUESTION: Well, it's an English word. It
13 means somebody who is combatting.

14 MR. DUNHAM: That's correct.

15 QUESTION: I assume it means someone who
16 is -- has taken up arms against the armed forces of
17 the United States. Isn't that -- really, do we have
18 to quibble about that word?

19 MR. DUNHAM: No. I mean, in its ordinary
20 sense, Your Honor, you're absolutely right. And
21 that's what we would take it to mean. We would give
22 it --

23 QUESTION: Well, if the Government's
24 right, he is an unlawful belligerent, I take it, if
25 the Government's right.

1 MR. DUNHAM: Well, the Government hasn't
2 claimed in this, on the record in this case, which is
3 limited to the Mobbs Declaration, it doesn't say
4 anywhere in the Mobbs Declaration that Mr. Hamdi is
5 an unlawful combatant. The Fourth Circuit in this
6 case limited the district court's consideration to
7 that, to that affidavit, and said he could consider
8 nothing else.

9 Now, there is nothing in that declaration
10 that says that Mr. Hamdi was an unlawful combatant.
11 And getting back to Justice Scalia's point, we do
12 accord the words enemy combatant their ordinary
13 English meaning because we have nothing else to tie
14 ourselves to, and those words mean an enemy is -- an
15 enemy is a member of a hostile power or force. And a
16 combatant is one taking part in combat.

17 QUESTION: Well, it certainly is possible
18 that a U.S. citizen could end up fighting for the
19 enemy in a war against our country. That's possible.

20 MR. DUNHAM: That's happened.

21 QUESTION: Yes.

22 QUESTION: Happening.

23 QUESTION: And so when that individual is
24 captured then, by our country, the question is, to
25 what extent does the habeas statute apply, and if it

1 does, are the proceedings limited in some way?

2 Because of that status of being an enemy combatant?

3 MR. DUNHAM: Well, Your Honor, I believe
4 that the -- his status is the thing that is the
5 subject of the habeas proceeding. I mean, if you
6 start from the premise that he is fighting against
7 our country, that's one thing. But what we are
8 saying here is that that fact is in dispute, and that
9 we ought to --

10 QUESTION: But you could say the same
11 thing about, about noncitizen combatants. I mean,
12 anyone captured in a war could say, you got the wrong
13 man. I, in fact, was not taking up arms against the
14 United States, and I insist upon a judicial
15 proceeding to let me make that point.

16 Now, you surely wouldn't allow every
17 captured enemy in a war to go through a habeas
18 proceeding because he wants to challenge the fact,
19 would you?

20 MR. DUNHAM: Your Honor --

21 QUESTION: Or would you? I don't know.

22 MR. DUNHAM: No. I wouldn't allow every
23 person captured to go through a habeas proceeding,
24 but there is a different legal status of a U.S.
25 citizen from an enemy alien captured on a

1 battlefield. They have a different status.

2 QUESTION: Well, I'm still not clear what
3 you do with Justice O'Connor's question and it's
4 basically the Quirin case. You are a citizen but you
5 are an enemy combatant and you are captured. Are
6 your rights any different from that of a noncitizen
7 in the same status? You haven't answered that.

8 MR. DUNHAM: Well, yes. First off, in
9 Quirin, we have to start with the premise that the
10 Quirin proceeding was authorized by Congress. They
11 were proceeding --

12 QUESTION: I'm asking you to distinguish
13 between citizen and noncitizen in the hypothetical
14 case where each are combatants against the United
15 States and are captured. Any difference?

16 MR. DUNHAM: Not in the Quirin case. No,
17 Your Honor.

18 QUESTION: Any difference in your view and
19 under your theory of the case that you're presenting
20 here?

21 MR. DUNHAM: Yes.

22 QUESTION: And what is that difference?

23 MR. DUNHAM: That difference is that
24 Mr. Hamdi is a citizen. He is not entitled to
25 belligerent immunity. He is subject to prosecution

1 under our laws if he was, in fact, participating in
2 taking up arms against our forces. But that begs the
3 question.

4 QUESTION: You mentioned, you mentioned in
5 connection with Quirin that there was a statute, and
6 I think one -- one of the defendants was alleged to
7 be a U.S. citizen. So I thought you were making what
8 -- were there regimes in prior wars for entertaining
9 the claims of people who said, I was an innocent
10 bystander, I was indeed captured by the enemy. In
11 Vietnam and World War II, were there means to
12 entertain the claims of people who said, I wasn't an
13 enemy?

14 MR. DUNHAM: There were regimes then and
15 there are regimes now, but they haven't been used by
16 the military here. There are outstanding military
17 regulations that provide for a hearing for someone
18 captured on the battlefield to determine their status
19 if there is any doubt as to their status.

20 QUESTION: Would those military
21 proceedings satisfy your claim? Your point is that
22 Hamdi has not had a chance to be heard on his claim
23 that this was a dreadful mistake, I wasn't an enemy.

24 MR. DUNHAM: Those proceedings would go a
25 long way towards satisfying the process part of our

1 claim, Your Honor, but they don't really address the
2 authorization part of our claim, which we have two
3 claims here really.

4 The first is that he has never been -- had
5 an opportunity to give, to assert a claim of
6 innocence. And those regulations, if they had been
7 followed in this case, would certainly have given him
8 that opportunity. And then if he filed a habeas
9 corpus petition which would be his right, the
10 district judge would have had a record of a hearing
11 like he does on a -- on reviewing a state criminal
12 conviction.

13 QUESTION: But I don't think any
14 proceeding, Mr. Dunham, conducted by the military at
15 this stage, is going to reveal much that's factual.
16 How are you going to get people, you know, if he was
17 seized on the battlefield, what evidence are you
18 going to get now from the, from those people who
19 probably don't even remember it? If the military
20 accorded some process at that time, as I understand
21 they said they did, surely that is more reliable than
22 anything that would come up now two years later.

23 MR. DUNHAM: Your Honor, they did not
24 provide any process as contemplated by their
25 regulations. In fact, the district judge offered to

1 let the military take this man and give him one of
2 those hearings. The very hearings their own
3 regulations specify.

4 QUESTION: What would you expect the
5 military to do? As I understand it, he wasn't even
6 captured by our own forces. He was captured by
7 allied forces and turned over to our forces.

8 MR. DUNHAM: Well, that's certainly,
9 certainly part of the problem, Your Honor. We have a
10 strong --

11 QUESTION: Well, you want them to run down
12 the members of the Afghan allies who captured this
13 man and get them to testify in a proceeding? It's
14 just putting unreasonable demands upon, upon a war
15 situation. I just --

16 MR. DUNHAM: Your Honor, I don't -- my
17 view is that it can never be an unreasonable demand
18 to comply with habeas corpus and the Fifth Amendment.

19 QUESTION: That is the question --

20 QUESTION: Are you claiming --

21 QUESTION: -- is what it means. And the
22 Chief Justice and Justice Scalia both indicated and
23 it concerns me, too. What do you want to happen at
24 this hearing? You get your hearing. Are we supposed
25 to send a Gulfstream over with 10 people who

1 witnessed the capture? How does this work?

2 MR. DUNHAM: Well, the military's own
3 regulations provide a good guide for how this hearing
4 would work. They allow testimony by affidavit when
5 it can't, when it's not convenient to obtain it in
6 any other way. And we are living in an age where we
7 have -- we are not living in the World War II age.
8 We have fax machines. We have phones that have
9 pictures. You can get depositions.

10 QUESTION: What if they get a deposition
11 from an American colonel who says this prisoner was
12 turned over to me by allied forces, our Afghan allies
13 in this combat, and I was assured by them that they
14 had captured him in a firefight? Now, is that going
15 to satisfy our habeas corpus review?

16 MR. DUNHAM: Your Honor, that would be a
17 lot more than what we have now.

18 QUESTION: Oh, it certainly would, but you
19 wouldn't accept that, would you?

20 MR. DUNHAM: Well, I wouldn't accept it
21 without Mr. Hamdi --

22 QUESTION: Of course you wouldn't.

23 MR. DUNHAM: -- an opportunity to be
24 heard. Fundamental to --

25 QUESTION: So your objection is not the

1 hearsay rule, your objection is the right to make
2 some kind of response. That's your basic process
3 claim?

4 MR. DUNHAM: That's correct, Your Honor.
5 That we have, we have never authorized detention of a
6 citizen in this country without giving him an
7 opportunity to be heard, to say, hey, I am an
8 innocent person. We don't -- he hasn't even been
9 able to say that yet. He hasn't been able to look at
10 the facts that have been alleged against him and give
11 any kind of an explanation as to his side of the
12 story, which may well turn out to be true and may
13 well clear up some of the deficiencies in the Mobbs
14 Declaration.

15 QUESTION: But if this -- I'm sorry. Go
16 on.

17 QUESTION: At this stage of the game, I
18 take it, you have no per se objection to some form of
19 military process, so long as he could be heard?

20 MR. DUNHAM: The only problem I would have
21 with that, Your Honor, and it's a small one, is that
22 the military has refused to give this process to him.

23 QUESTION: Well, I realize that. But
24 that's what you're -- you're asking us for something.
25 And my suggestion is, if I understand your argument,

1 that if ultimately you were found, your client was
2 found to be entitled to some process, it might be,
3 consistently with your position, that military
4 process with an opportunity to be heard in response
5 would satisfy your demand.

6 MR. DUNHAM: Yes. That's correct, Your
7 Honor.

8 QUESTION: All right.

9 MR. DUNHAM: The military procedure
10 requires the military to call witnesses and allows
11 the detainee an opportunity to give his own side of
12 the story and call his own witnesses.

13 QUESTION: Do you still think that habeas
14 is necessary in order to determine that`that process
15 has been afforded him?

16 MR. DUNHAM: Well, right now, habeas is
17 necessary to even get him that process.

18 QUESTION: Let's assume the regime that
19 Justice Souter suggested, it's in place. You are
20 entitled to habeas in order to ensure that that has
21 taken place and have, have the Article III court
22 supervise that, or would affidavits that this, from
23 the Government that this procedure has been afforded
24 be satisfactory?

25 MR. DUNHAM: That would be a separate

1 habeas proceeding, Your Honor, which might be filed
2 after the hearing was held by the military, and --

3 QUESTION: I'm asking if you are entitled
4 to file that as a matter of right.

5 MR. DUNHAM: I believe that any U.S.
6 citizen has a right to file a habeas corpus petition
7 at any time he is detained by the government. But I
8 don't know that the Article III court would need to
9 supervise the military hearing if that's what he got.
10 He would certainly have the right, when that hearing
11 was over, just like anybody does, to file a habeas
12 petition saying that I'm detained by the government.

13 And then the district judge could look at
14 the hearing, if there was a hearing by the military,
15 he could review it for fundamental fairness, if
16 that's what the detainee decided to do at that point.
17 But it wouldn't be --

18 QUESTION: But it is reviewable on habeas?
19 You are not saying that it would be an adequate
20 defense in a subsequent habeas position simply to say
21 there was a hearing of the kind prescribed in the
22 military regulations, and after that hearing, he was
23 found to be an enemy combatant. That would not
24 satisfy you? You would allow the habeas court to
25 re-examine the facts brought up in that hearing?

1 MR. DUNHAM: I believe that the habeas
2 court could always review the process to see that it
3 was fair. That's a habeas court's function.

4 QUESTION: Right.

5 MR. DUNHAM: But it wouldn't be anything
6 extensive. If there was a record from the military
7 proceeding, the district judge would simply --

8 QUESTION: Well, it depends on what you
9 mean by fair, of course, and what, you know, what
10 common law courts usually mean by fair, for example,
11 is no hearsay testimony. And you apply that rule to
12 a wartime situation and everybody will get off.

13 MR. DUNHAM: Well, Your Honor, the
14 regulations, the military's own regulations say how
15 the hearing is to be held. The district judge would
16 be basically looking to see whether those regulations
17 were complied with.

18 QUESTION: Oh, that's different. I
19 thought you said that he would look to see whether
20 those regulations were fair.

21 MR. DUNHAM: Oh, no, not the regulation --
22 whether the proceeding was fair, whether it complied
23 with due process. And that would --

24 QUESTION: That's something quite
25 different from saying they followed the regulations.

1 The regulations might be something that a common law
2 judge thinks does not comply with due process. In
3 that case, you would override the military judgment,
4 right?

5 MR. DUNHAM: Well, I believe the district
6 court has that power, Your Honor. The Article III
7 court has that power in a habeas proceeding.

8 QUESTION: But I didn't understand your
9 basic answer. The basic question is, in the ordinary
10 case, not some unusual case, but in the ordinary
11 case, if they set up an ordinary military tribunal
12 according to Article I(6) and it worked and so forth,
13 then isn't that due process? I thought Justice
14 Scalia -- in response to Justice Scalia's questions,
15 you said that wouldn't satisfy you, but my impression
16 was you were saying in the ordinary case, that would
17 satisfy you.

18 MR. DUNHAM: That's correct.

19 QUESTION: All right, it would satisfy
20 you. Fine.

21 MR. DUNHAM: All I wanted to say was that
22 you haven't had that hearing.

23 QUESTION: No, I understand that. That's
24 the second half of my question. They could satisfy
25 you, I take it, in one of two ways. A, that they

1 have the military tribunal that they've given in
2 every war or so forth, the ordinary procedure there,
3 a neutral decision maker and an opportunity to
4 present proofs and arguments, or B, they don't do
5 that.

6 Now, if they refuse to do that, then what,
7 in your opinion, should the habeas court do?

8 MR. DUNHAM: Then the habeas court should
9 hold a hearing that would be very similar to what the
10 military should have done. Judge Doumar here tried
11 to send the case back to the military to have them
12 hold the very hearing we're talking about, using
13 their own officers to do it just as the military
14 regulations require it.

15 QUESTION: But that would be a different
16 approach. I mean, it might be not that the habeas
17 court has to hold the hearing that the military would
18 have held, but that the habeas court has to say to
19 the military, hold the hearing or let him go. You
20 would be satisfied, I take it, if the habeas court,
21 on Justice Breyer's hypothesis, said, hold the
22 hearing.

23 MR. DUNHAM: That would be satisfactory,
24 Your Honor, but the question is what interferes with
25 the military more, for the district judge to hold a

1 hearing that the military has previously refused to
2 do, or to order the military to follow their own
3 rules?

4 QUESTION: Was there a reason given --
5 when the district judge suggested that solution, why
6 did the Government say, we don't want to use the
7 procedure that we used, say, in Vietnam?

8 MR. DUNHAM: As I recall, the answer was
9 we're not required to and we don't choose to do so.

10 QUESTION: Is that procedure -- does that
11 have -- did Congress have a part in that, the
12 military regulations that provided for how you treat
13 people in wartime situations who say, I'm innocent
14 essentially?

15 MR. DUNHAM: Well, Congress has not passed
16 these rules.

17 QUESTION: Well, Congress did pass
18 something called the authorization for use of
19 military force, did it not?

20 MR. DUNHAM: Yes, it did, Your Honor.

21 QUESTION: And it affects this very
22 conflict.

23 MR. DUNHAM: Yes, it does, Your Honor.

24 QUESTION: Now, what application does that
25 have here? It appears to allow detention of people

1 captured.

2 MR. DUNHAM: The authorization for use of
3 military force does not have the word detention
4 anywhere in it. It talks about use of force and it
5 is the equivalent, in our view, of a declaration of
6 war. Although it is not a formal declaration of war,
7 it would have that same operative effect. And in our
8 history, we have never had any substantive rights
9 conveyed to the commander-in-chief by the mere act of
10 a declaration of war.

11 QUESTION: Inherently, I mean, certainly,
12 you know, when there is a declaration of war or a
13 resolution such as this, surely the President has the
14 right to kill foreign combatants, no?`

15 MR. DUNHAM: He certainly has the right to
16 kill them and if they're aliens --

17 QUESTION: Now, is it conceivable that he
18 has to kill them but not to detain them?

19 MR. DUNHAM: He has the right to detain
20 alien combatants, no question about it. But when it
21 comes to U.S. citizens, you don't simply detain them.
22 You prosecute them, like they did with John Walker
23 Lindh.

24 QUESTION: You're saying that AMUF is
25 insufficient in this case to detain, because

1 declarations of war and the AMUF historically have
2 simply authorized the President to use his judgment
3 and his force and his capacities and his power
4 without having an extensive list of the different
5 things that he can do. And you're asking for
6 something quite different, it seems to me.

7 MR. DUNHAM: Well, in the War of 1812,
8 there was a general declaration of war but Congress
9 still passed a list of specific things the President
10 could do. Obviously a declaration of war doesn't
11 give the President the power to appropriate funds to
12 fight the war.

13 QUESTION: No, but look, it does say in
14 this authorization, the President is authorized to
15 use all necessary and appropriate force against
16 persons he determines planned, authorized, committed
17 or aided the terrorist attacks.

18 MR. DUNHAM: If that is interpreted to
19 mean that he can impose indefinite executive
20 detention on anybody that he thinks is necessary in
21 order to fulfill that command, we could have people
22 locked up all over the country tomorrow without any
23 due process, without any opportunity to be heard,
24 because we know that this war that we're talking
25 about here is going on worldwide and it's going on

1 within our own borders.

2 Congress didn't intend to -- when it
3 passed this authorization for use of military force
4 to authorize widespread detentions of people with no
5 opportunity to be heard, indefinite, solitary
6 confinement for as long as they might live. Congress
7 -- there is no indication that Congress intended any
8 such thing.

9 QUESTION: Did Congress intend that the
10 President has the authority and the right to use
11 whatever powers are necessary to suppress the
12 terrorists and to prevent future attacks, consistent
13 with the traditions and the powers of that office?

14 MR. DUNHAM: I believe they`authorize it
15 consistent with our laws. I don't think Congress
16 repealed any laws when they wrote the authorization
17 for use of military force.

18 QUESTION: Mr. Dunham, can I ask you sort
19 of a preliminary question. We're talking about way
20 down the road now, but do you contest any of the
21 facts in the Mobbs Declaration?

22 MR. DUNHAM: Well, I've only recently been
23 allowed to talk to my client, Your Honor, and
24 everything he has told me they tell me is classified,
25 so I'm not allowed to convey it to the Court this

1 morning. But the best I can say is in an overall
2 general way, there is a substantial dispute.

3 QUESTION: There is a substantial dispute,
4 and have you had an opportunity, on behalf of the
5 client, to supplement or to contradict or supplement
6 the information in the Mobbs Declaration?

7 MR. DUNHAM: No, because it's -- it's
8 while the matter has been pending before this Court
9 and there is no way to go before the Court at this
10 point, absent a remand, in order to do that. If the
11 Court remanded, I would be able to do that provided
12 that we had appropriate protective orders in place so
13 that I could convey classified information to the
14 Court.

15 QUESTION: Mr. Dunham, one of the judges
16 on the Fourth Circuit in the en banc denial, Judge
17 Mock, had a proposal that was similar to the one that
18 Judge Mukasey proposed in New York. And that is,
19 initially, the Mobbs affidavit is taken as true but
20 that you have an opportunity to rebut it. Would that
21 be a satisfactory -- would that comport with your
22 process?

23 MR. DUNHAM: Your Honor, that is the way
24 the statutory habeas proceeding is supposed to
25 unfold. The Government doesn't deny that we have a

1 right to have a habeas proceeding. They've conceded
2 it at three different points in their brief. So once
3 we're before the court on a petition for habeas
4 corpus, the question is what does that proceeding
5 look like. And I suggest it's spelled out in the
6 U.S. code.

7 When Congress passed the authorization for
8 use of military force, it did not say we suspend
9 habeas. Habeas corpus statutes are still on the
10 books and exactly what Your Honor is talking about is
11 what should happen.

12 QUESTION: So every United States citizen,
13 even if they're captured on the field of combat, is
14 entitled to a habeas hearing?

15 MR. DUNHAM: That of course assumes he's
16 captured on the field of combat, Your Honor, which we
17 don't concede.

18 QUESTION: Well, that's right. He's
19 entitled to a habeas hearing to determine whether in
20 fact he was captured on the field of combat opposing
21 the United States, right?

22 MR. DUNHAM: Well, if he files a petition
23 for habeas corpus, yes.

24 QUESTION: And I presume that anybody who
25 claims to be an American citizen would be entitled to

1 a habeas hearing on the question of whether he is in
2 fact an American citizen, and then the subsequent
3 question of whether he was captured on the field of
4 combat while taking up arms against the
5 United States, right?

6 MR. DUNHAM: Well, the military --

7 QUESTION: So every foreigner captured, if
8 he claims to be an American citizen, would be
9 entitled to the kind of habeas hearing you're talking
10 about?

11 MR. DUNHAM: Not necessarily on a mere
12 claim, Your Honor. The military is required to take
13 a long list of biographical data from anybody they
14 capture. And in this particular case, there is no
15 dispute about the man's citizenship. There is a
16 birth certificate in the record. The military has
17 not -- they're the ones that determined he was a
18 citizen.

19 QUESTION: I'm not talking about this
20 case. I'm talking about the principle that you're
21 asking us to adopt and how it would apply. I mean,
22 if there is a habeas corpus right for an American
23 citizen, there has to be, it seems to me, a habeas
24 corpus right for everyone who claims he is an
25 American citizen.

1 MR. DUNHAM: Your Honor, that may be the
2 case but that doesn't justify taking away the habeas
3 corpus right from a citizen. That is a right that
4 has been there since this country was founded and it
5 doesn't justify taking away a citizen's right because
6 some sham claim might be made.

7 QUESTION: Whether it's been there since
8 the country was founded when he was captured on the
9 field of battle is the very controverted question
10 that's up here. You can't say that with that
11 assurance. I mean, that's why we have a case here.

12 MR. DUNHAM: If it please the Court, I
13 would like to save the balance of my time for
14 rebuttal.

15 QUESTION: Very well, Mr. Dunham.
16 Mr. Clement, we'll hear from you.

17 ORAL ARGUMENT BY PAUL D. CLEMENT
18 ON BEHALF OF RESPONDENTS

19 MR. CLEMENT: Mr. Chief Justice and may it
20 please the Court:

21 Petitioners contend that the Government
22 categorically lacks the authority to hold Hamdi as an
23 enemy combatant. But it has been well established
24 and long established that the Government has the
25 authority to hold both unlawful enemy combatants and

1 lawful prisoners of war captured on the battlefield
2 in order to prevent them from returning to the
3 battle.

4 Over 10,000 United States troops remain on
5 the field of battle in Afghanistan. No principle of
6 law or logic requires the United States to release an
7 individual from detention so that he can rejoin the
8 battle against the United States.

9 QUESTION: But the question of whether
10 it's a criminal procedure or this detention without
11 -- does the Government have any rhyme or rationale as
12 to why some of these people -- I think Mr. Dunham
13 mentioned Lindh, there is also Moussaoui, there is
14 this John -- they are also being kept away from
15 returning any place because there are criminal
16 charges against them.

17 And then there is Hamdi and Padilla and
18 Almorai who are in this detention state with no
19 charges. What does the Government -- how does the
20 Government justify some going through the criminal
21 process and others just being held indefinitely?

22 MR. CLEMENT: Justice Ginsburg, I think
23 that reflects the sound exercise of prosecutorial and
24 executive discretion. There are some individuals who
25 may be captured in a situation where they did not

1 have any particular intelligence value, they have
2 been handled in a way where there are no difficult
3 evidentiary questions that would be raised in a
4 criminal prosecution and those individuals can be
5 dealt with in the Article III system.

6 But there are plenty of individuals who
7 either have a paramount intelligence value that
8 putting them into the Article III system immediately
9 and providing them with counsel whose first advice
10 would certainly be to not talk to the Government is a
11 counterproductive way to proceed in these cases.

12 QUESTION: At the moment, nobody --

13 QUESTION: I'm trying to find whether
14 there is any literature or commentary on how long the
15 detention is required before the intelligence value,
16 the interrogation value of the custody serves no
17 further purpose. Can you give me any ideas of the
18 outer bounds of how long the detention would take in
19 order to get the value from the interrogation that
20 you want?

21 MR. CLEMENT: Well, Justice Kennedy, I'm
22 not sure I can give you the outer bounds, but what I
23 can say is that the case here before you today in
24 Hamdi, and the case in Padilla, suggests that the
25 amount of time that is necessary to allow for

1 interrogation without access to counsel in order to
2 get intelligence is not an indefinite period of time.

3 Both these individuals now have access to
4 counsel because the military intelligence experts who
5 make these judgments have made the judgment that
6 access to counsel at this point does not interfere
7 with the intelligence gathering process.

8 QUESTION: Would it be --

9 QUESTION: Mr. Clement, how can you
10 assume --

11 QUESTION: Would it be a helpful line of
12 inquiry for a district court, assuming that there is
13 some jurisdiction in the district court, which you
14 would contest, to have testimony as to how effective
15 interrogations are and how long it takes. And then
16 we could begin to get some understanding of this
17 process?

18 MR. CLEMENT: I suppose you could. One
19 thing I would point you to, Justice Kennedy, is the
20 declaration of Vice Admiral Jacoby, who is the director
21 of the Defense Intelligence Agency. That's at page 75 of
22 the Joint Appendix in the Padilla case.

23 And I think that -- there obviously are
24 various ways the courts could approach this. A court
25 in one proceeding could take evidence of the question

1 generally. I suppose if there were a situation in
2 which there was a habeas petition filed and there was
3 an initial period where there was no access to
4 counsel, if a judge for some reason thought that that
5 had taken too long, I suppose that judge could make
6 an inquiry of the Government, and in an ex parte
7 proceeding, they could make some kind of filing
8 explaining to the judge why it is that further
9 interrogation without counsel is necessary.

10 I think the important thing is twofold.
11 One, to recognize that there is a unique interest,
12 especially in the course of this conflict, where
13 intelligence is at unprecedented value, to have some
14 ability with some detainees to deal with them in a
15 way that allows us to get intelligence to prevent
16 future terrorist attacks, and not be limited just to
17 going after them retrospectively for past terrorist
18 attacks.

19 QUESTION: We can accept that, but what do
20 you, what do you make of Section 4001. I take it
21 it's the Government's position that it has absolutely
22 no application to the situation. That it simply
23 refers to the normal circumstances of the criminal
24 law. Is that right?

25 MR. CLEMENT: That's right, Justice

1 Souter, but I would be quick to add that we -- I
2 mean, all 4001(a) says is that an individual must be
3 detained pursuant to an act of Congress.

4 QUESTION: Right.

5 MR. DUNHAM: If one needs an act of
6 Congress, and we question whether this really has
7 anything to do with the detention of enemy combatants
8 by the military, but to the extent an act of Congress
9 is necessary, as I think Justice O'Connor's questions
10 indicated, the authorization of force provides more
11 than ample statutory --

12 QUESTION: It certainly did -- may I just
13 ask one more question? I will concede certainly at
14 least for the sake of argument that it did in the, in
15 the early stages of the period starting with
16 September 11th. I will assume for the sake of
17 argument that it did when it was passed.

18 It doesn't follow, however, that it is
19 adequate for all time. The fact is, I will assume
20 that on September 12th, without any authorization
21 from Congress at all, the President could have taken
22 action in relation to this individual, I mean, if he
23 had been fighting on a battlefield that the President
24 took.

25 But it doesn't follow that the President's

1 authority to do that is indefinite for all time. And
2 I guess the question I would be interested in and
3 your response to is this. Is it reasonable to think
4 that the, that the authorization was sufficient at
5 the time that it was passed, but that at some point,
6 it is a Congressional responsibility, and ultimately
7 a constitutional right on this person's part, for
8 Congress to assess the situation and either pass a
9 more specific continuing authorization or at least to
10 come up with the conclusion that its prior
11 authorization was good enough. Doesn't Congress at
12 some point have a responsibility to do more than pass
13 that resolution?

14 MR. CLEMENT: Well, Justice Souter, I
15 would say a couple of things. One is there may be
16 some difficult questions down the road, but if there
17 is emphasis that 10,000 United States troops remain
18 on the battlefield in Afghanistan --

19 QUESTION: Well, there are 10,000 troops
20 there, but it's two and a half years later. And it
21 may very well be that the, that the constitutional
22 obligation and the constitutional demand that his
23 client can make is that the political branch take
24 a -- make a further assessment and a more specific
25 one. I'm not denying that there is a lot going on,

1 but there has also been time.

2 MR. CLEMENT: I realize that, Justice
3 Souter. Let me say one other thing. And then if I
4 have time, I'd come back to the 10,000 troops still
5 on the ground. What I would say is Congress has been
6 open with whatever appropriate recesses every day
7 since September 18th, 2001 when they passed the joint
8 resolution.

9 If they were to pass some specific statute
10 that either provided for more finely reticulated
11 procedures for dealing with enemy combatants or tried
12 to preclude the detention of certain individuals,
13 then I think one of two things would happen, either
14 the executive branch would follow those more
15 reticulated provisions, or I suppose if there was a
16 judgment by Congress that this authority was denied
17 all together and the President thought that that
18 authority was absolutely necessary to the fighting of
19 the battle in Afghanistan, then you might have a
20 situation where we came to this Court in a situation
21 that Justice Jackson would say the executive's power
22 is at its lowest ebb.

23 But here we come to the Court with that
24 authorization that the President relied on.

25 QUESTION: You come with an authorization

1 that the President relied on and which I will assume
2 he quite rightly relied on at the time it was passed.
3 But my question is a timing question. Is it not
4 reasonable to at least consider whether that
5 resolution needs, at this point, to be supplemented
6 and made more specific to authorize what you are
7 doing?

8 MR. CLEMENT: Well, again, Justice Souter,
9 I can't imagine that the rule is that the executive
10 somehow suffers if Congress doesn't fill the breach.
11 Because the last word from Congress is that -- that
12 all necessary and appropriate force is authorized.

13 QUESTION: Yes, but when you say the
14 executive, I think your response is assuming that the
15 executive has the power. And it may very well be
16 that the executive has power in the early exigencies
17 of an emergency. But that at some point in the
18 indefinite future, the other political branch has got
19 to act if that, if power is to continue.

20 MR. CLEMENT: But Justice Souter, they
21 have authorized the use of force. They recognize, if
22 you took --

23 QUESTION: Without any specific reference
24 to this situation, without any specific reference to
25 keeping American citizens detained indefinitely. I

1 mean, that's the problem.

2 QUESTION: Mr. Clement, this Section 4001
3 doesn't relate to a hearing, it relates to the
4 President's power to detain, doesn't it?

5 MR. CLEMENT: Well, absolutely.

6 QUESTION: So if it expires after two and
7 a half years, it would just not mean you have to give
8 them counsel after two and a half years or give them
9 a hearing after two and a half years. It means you
10 would have to let them go back to Afghanistan after
11 two and a half years, wouldn't it?

12 MR. CLEMENT: It would, Justice Scalia --

13 QUESTION: It would, but it uses --

14 MR. CLEMENT: And that's why I find it so
15 remarkable that we have to confront this question
16 when our troops are still on the ground in
17 Afghanistan.

18 QUESTION: Wait. You're also -- the words
19 are necessary and appropriate. And also the words in
20 the Constitution are due process of law. And also
21 the words in the Magna Carta were according to law.
22 And whatever form of words in any of those documents
23 there are, it seemed to refer to one basic idea
24 that's minimum. That a person who contests something
25 of importance is entitled to a neutral decision maker

1 and an opportunity to present proofs and arguments.

2 You have heard, in the last hour, people
3 talking about the military itself recognizing that
4 basic principle with tribunals in what is called Army
5 Reg 190.8. Now, is there any reason why, when a
6 person says I am not a combatant, I was a relief
7 worker, I wasn't even there, I was sold into this by
8 people who wanted a bounty, is there any reason why
9 you could not have that kind of proceeding, the kind
10 of proceeding that was given in the Gulf War on the
11 battlefield in hundreds of instances, that was given
12 in Iraq in hundreds of instances, the kind of
13 proceeding that the military itself has given over
14 and over and over.

15 Now, is there any reason why that isn't
16 necessary and appropriate, or why that isn't in
17 accordance with law or due process of law?

18 MR. CLEMENT: Justice Breyer, let me say
19 several things. One is that the regulations that are
20 being bandied about are the regulations that the Army
21 uses to comply with their obligations under Article V
22 of the Geneva Convention.

23 Now, Article V of the Geneva Convention
24 does not apply here, and let me address why in a
25 minute, but let me say very clearly that these

1 individuals have gotten military process. It might
2 not have been the exact process --

3 QUESTION: That wasn't the question I
4 asked. The question I asked, is there any reason why
5 the Army itself could not give a comparable basic
6 proceeding where you have a neutral decision maker,
7 and a practical, but fair opportunity to present
8 proofs and arguments? Not some kind of thing on the
9 battlefield, something two years later, not some kind
10 of thing where you haul in witnesses, but something
11 that's practical insofar as you get evidence that's
12 reasonably available.

13 MR. CLEMENT: Well, Justice Breyer --

14 QUESTION: I want a practical answer. I
15 don't want a -- yes.

16 MR. CLEMENT: I understand that. But the
17 practical answer that you are looking for assumes a
18 process that's never been provided. There has never
19 been a process that's removed from the battlefield.
20 What Article V provides and what the military
21 regulations provide is immediately adjunct to the
22 battlefield, you have three military officers who do
23 a very quick hearing, the purpose of which primarily
24 is to figure out not whether somebody is completely
25 innocent, but to figure out whether they are properly

1 classified as a prisoner of war, as opposed to an
2 unlawful enemy combatant.

3 QUESTION: So you say the regulations in
4 place provide for that battlefield type review?

5 MR. CLEMENT: They do, Justice O'Connor --

6 QUESTION: Did this Petitioner have that
7 type of review?

8 MR. CLEMENT: This Petitioner, Justice
9 O'Connor, did not get that precise type of review,
10 and the reason is because, based on a Presidential
11 determination, the military officers understood that
12 Article V of the Geneva Convention has no application
13 here. Again, that provision, and I think it's worth
14 --

15 QUESTION: Well, perhaps not, but we are
16 here on habeas. Do you agree that, that he is
17 entitled to bring a habeas action?

18 MR. CLEMENT: We do agree that he is
19 entitled to bring a --

20 QUESTION: Okay.

21 MR. CLEMENT: -- habeas action.

22 QUESTION: So then we have to decide then
23 to what is he entitled, and even that minimal review
24 by the military, you think, is not required?

25 MR. CLEMENT: Well, I don't think it's

1 required, especially in a situation like this, where
2 although Hamdi did not receive an Article V hearing
3 because it was inapplicable, he did receive military
4 process. When he was originally turned over to the
5 United States forces by the Northern Alliance, our
6 military allies, there was a screening process on the
7 ground in Afghanistan. Now, that process screened
8 out 10,000 individuals out of U.S. custody. So he
9 received that process.

10 Now, to be sure, it's a military process,
11 but it is the kind of process that prisoners of war
12 and enemy combatants have always gotten. Now,
13 because of the nature of this war, Hamdi got
14 additional process. And it's important to point out
15 that this Article V process that other prisoners of
16 war traditionally get is a one-shot deal. It's done
17 off the battlefield and that's it. You are under
18 detention for the remainder of the battle. And
19 there's no reason for Congress to have to go in with
20 a new resolution. You are there for the remainder of
21 the war.

22 Now, in this context, because we recognize
23 that there are some unusual aspects of this war, and
24 also because the United States military has no
25 interest in detaining any individual who is not an

1 enemy combatant or who does not present a continuing
2 threat, when Hamdi got to Guantanamo, he was given
3 additional screening processes. That screened him in
4 as well. Did not screen him out.

5 Then it may not seem what you think of as
6 traditional due process in an Article III sense, but
7 the interrogation process itself provides an
8 opportunity for an individual to explain that this
9 has all been a mistake. And as the affidavit that's
10 in the record here shows --

11 QUESTION: Do you say he had that
12 opportunity?

13 MR. CLEMENT: Absolutely, Justice
14 O'Connor. And the affidavit that's filed here
15 represents, by Mr. Mobbs, that the interrogation
16 process, in that process, his story confirmed that he
17 was on the battlefield and surrendered with the
18 Taliban military unit while armed.

19 QUESTION: Do you concede that you have
20 the obligation to make the representation that you
21 have just made to the habeas court?

22 MR. CLEMENT: Justice Kennedy, I'm not
23 positive what the ultimate minimum that the habeas
24 statutes would require in this context, but we do
25 think that an appropriate balance of individual

1 rights, the traditional role of habeas, that the
2 overwhelming military imperatives of this situation
3 are that the habeas corpus writ is available, first
4 to make legal challenges to the detention along the
5 lines of 4001(a) categorically precludes this, and
6 those challenges have been open.

7 We also think it appropriate for the
8 United States to come in with a declaration that
9 explains the basis for the military's decision. And
10 particularly, I think what it does is it provides an
11 explanation that if believed, provides a basis for a
12 court to police the line that separates Quirin on the
13 one hand from Milligan on the other.

14 And obviously, a situation like this with
15 a battlefield detainee who surrendered while armed on
16 the battlefield is a classic case of an enemy
17 combatant.

18 QUESTION: Is there any --

19 QUESTION: In Quirin, in Quirin, the
20 defendants were heard, and that's -- the Mobbs
21 affidavit is, I take it your position is, yes,
22 habeas, and yes, the Government has to come forward
23 with something. And the something they came forward
24 with is the Mobbs affidavit, which is hearsay,
25 because Mobbs doesn't know what happened on the

1 battlefield either. And that there is no statement
2 at any point from Hamdi, although the claim before us
3 is that he would dispute what's in the Mobbs
4 affidavit, but he doesn't have an opportunity to do
5 that.

6 MR. CLEMENT: Well, Justice Ginsburg, I
7 mean, there actually is, I mean, it would be
8 something like double hearsay, but there is a
9 statement in the Mobbs declaration itself where Mobbs
10 is summarizing that Hamdi himself --

11 QUESTION: Yes, but that certainly is
12 double hearsay.

13 MR. CLEMENT: It certainly is, but this
14 is --

15 QUESTION: The person who is locked up,
16 doesn't he have a right to bring before some tribunal
17 himself his own words, rather than have a Government
18 agent say what was told to him that somebody else
19 said.

20 MR. CLEMENT: With respect, Justice
21 Ginsburg, he has an opportunity to explain it in his
22 own words. Now, it may not --

23 QUESTION: During interrogation/.

24 MR. CLEMENT: During interrogation.

25 QUESTION: I mean, is that your point?

1 MR. CLEMENT: During interrogation.
2 During the initial screening. During the screening
3 in Guantanamo.

4 QUESTION: How about to a neutral decision
5 maker of some kind, perhaps in the military? Is that
6 so extreme that it should not be required?

7 MR. CLEMENT: No, Justice O'Connor. And
8 let me say two things. One is when the initial
9 screening criteria are applied in the field, for all
10 intents and purposes, that is a neutral decision
11 maker.

12 I mean, as I said before, the Army is not
13 interested in holding people as enemy combatants that
14 don't qualify for that and don't pose a threat. The
15 second thing I would say, though, is that as I
16 understand it, the plan on a going-forward basis
17 reflecting the unique situation of this battle is to
18 provide individuals like Hamdi, like Padilla, with
19 the equivalent of the annual review process that's
20 laid out in the briefs --

21 QUESTION: Well, let's talk about that for
22 just a moment. What is it that the Government is
23 saying will be provided?

24 MR. CLEMENT: Well, Justice O'Connor,
25 those regulations are still in draft form.

1 QUESTION: So we don't know?

2 MR. CLEMENT: We don't know for sure. I
3 think what's envisioned is an opportunity to go
4 before a neutral tribunal, some opportunity to
5 present --

6 QUESTION: Yes, but Mr. Clement, you're
7 assuming he has no right to counsel, aren't you?

8 MR. CLEMENT: Justice Stevens, what we're
9 assuming is that he has no right to counsel that is
10 automatic and as of right --

11 QUESTION: If he could get his own
12 counsel, would he be entitled to consult with his
13 counsel during the preliminary stages of his
14 detention?

15 MR. CLEMENT: Not at the preliminary
16 stages if the Government has made a determination
17 that access to counsel would interfere with the
18 intelligence gathering process.

19 QUESTION: Are there any cases -- it
20 sounds from your argument that the principle
21 interests that the Government wants to advance is the
22 ability to interrogate the person for a sufficient
23 length of time to determine whether they get valuable
24 information out of them or not.

25 And to deny him counsel during that

1 period, because he may not be as willing to talk.
2 Now, it seems to me there are two things about that I
3 wanted to ask you about. One, have you considered
4 the possibility that perhaps a lawyer would have
5 explained to this man that if you do give some
6 information, you won't have to stay here
7 incommunicado for two or three years? That might be
8 a motivation to talk. That's one possibility.

9 And the second thing I want to ask you
10 about, are there any cases in the international field
11 or the law anywhere, explaining that the interest in
12 detaining a person incommunicado for a long period of
13 time for the purpose of obtaining information from
14 them is a legitimate justification?

15 I understand for arresting on the
16 battlefield, that's perfectly clear. But is this
17 prolonged detention for that purpose the subject of
18 judicial writing anywhere that you know about?

19 MR. CLEMENT: Let me answer both parts of
20 your question, Justice Stevens. Certainly it has
21 occurred to us and we have considered the possibility
22 that in some circumstances with some individuals, the
23 best way to get them to cooperate and provide
24 information is to give them a lawyer who will tell
25 them, boy, you know, it's in your best interest to

1 plead to this relatively minor material support
2 charge or whatever and provide the Government with
3 everything that you have.

4 And that is part of the answer to
5 Justice Ginsburg's earlier question, is why is it
6 that there is this pattern that you look at and some
7 people are used in the Article III system and other
8 people are prosecuted or dealt with in preventative
9 detention in the military system.

10 And it reflects a judgment by people whose
11 job it is to make these judgments that certain
12 people, the best way to get them to cooperate, or
13 maybe with certain individuals after you've gotten a
14 certain amount of information from them, but you feel
15 there is one other area you're not going to get
16 unless the dynamic fundamentally changes, those
17 people may be best dealt with in the way that you
18 envisioned. Whereas other individuals, the only way
19 that the judgment of the intelligence experts had to
20 deal with them is to provide them without counsel and
21 to use an interrogation.

22 I think to your second point of the
23 question, I don't know that there are any authorities
24 that I'm aware of that address exactly what you're
25 talking about, but I think there are two types of

1 authority that we would point to as being very
2 important. First of all, it's long been recognized
3 that one of the major justifications for the
4 detention of enemy combatants or prisoners of war is
5 to gather intelligence. And we cite some sources to
6 that effect in the brief.

7 The second thing, and I think this is
8 important, is that it has never been the case that
9 prisoners of war are entitled to counsel to challenge
10 their capture or their detention. What has happened
11 historically, and what the Geneva Convention
12 provides, is that if one of those enemy combatants is
13 charged with a specific war crime, then at that point
14 they're entitled to counsel. But if they are just
15 being held in a preventative detention, then in that
16 circumstance, they are not entitled to counsel.

17 QUESTION: But have we ever had a
18 situation like this where presumably this status --
19 war-like status could last for 25 years, 50 years,
20 whatever it is.

21 MR. CLEMENT: A couple of responses,
22 Justice O'Connor. First of all, in the midst of any
23 war, the detention may seem like it's indefinite
24 because if you talk about a detainee in 1942, they're
25 not going to know how long World War II is going to

1 last. And their detention may seem indefinite but
2 those detentions have always been approved under the
3 law of war.

4 Second, with respect to Al Qaeda and
5 individuals who are hard core Al Qaeda operatives,
6 the end of the war is a very difficult thing to
7 perceive. But with respect to somebody who is
8 captured on the battlefield with the Taliban, this
9 war may eventually -- the executive may make the
10 judgment or Congress may help us make the judgment
11 that the war in Afghanistan is effectively over.

12 And individuals who only really posed a
13 danger of rejoining the battle in Afghanistan would
14 be released. Now, there may be a few individuals
15 who, as I say, are hard core Al Qaeda operatives and
16 they're going to join the battle against the
17 United States wherever it's waged. They're just in
18 Afghanistan because that's where the action is.

19 QUESTION: May I ask just one other
20 question, I think it's just relevant. But do you
21 think there is anything in the law that curtails the
22 method of interrogation that may be employed?

23 MR. CLEMENT: Well, I think there is,
24 Justice Stevens. I mean --

25 QUESTION: And what is that?

1 MR. CLEMENT: Well, just to give one
2 example, I think that the United States is signatory
3 to conventions that prohibit torture and that sort of
4 thing. And the United States is going to honor its
5 treaty obligations. The other thing that's worth
6 mentioning of course --

7 QUESTION: But you said something about
8 self-executing. In connection with the Geneva
9 Convention, you said, well, it's not self-executing.
10 Would you say the same thing about the torture
11 convention?

12 MR. CLEMENT: Justice Ginsburg, I actually
13 have the sense that the torture victims -- you have
14 the Torture Victim Protection Act, of course, which I
15 think doesn't actually apply to the United States.
16 So I'm not sure that there would be any other basis
17 for bringing a private cause of action against the
18 United States.

19 But as this Court noted in footnote 14 of
20 the Eisentrager opinion, the idea that a treaty is
21 going to be enforced through means other than a
22 private cause of action doesn't mean that it's not a
23 binding treaty, doesn't mean that it's not going to
24 constrain the actions of the executive branch.

25 Just to finish up my answer to Justice

1 Stevens' question, I wouldn't want there to be any
2 misunderstanding about this. It's also the judgment
3 of those involved in this process that the last thing
4 you want to do is torture somebody or try to do
5 something along those lines.

6 I mean, if there were an artificial -- if
7 you did that, you might get information more quickly,
8 but you would really wonder about the reliability of
9 the information you were getting. So the judgment of
10 the people who do this as their responsibility is
11 that the way you would get the best information from
12 individuals is that you interrogate them, you try to
13 develop a relationship of trust.

14 QUESTION: But doesn't the Court have some
15 business intervening at some point, if it's the
16 Hundred Years War or something?

17 MR. CLEMENT: Well, Justice Breyer, I
18 mean, there may be a point where, depending on the
19 nature of the war -- I mean, I'm not quite sure what
20 you have in mind that they would intervene on.

21 QUESTION: At some point, if you're
22 holding people without a lawyer, with the only
23 neutral decision maker being an interrogator, with no
24 opportunity to present proofs and evidence, with no
25 opportunity to hear the other side, in your opinion,

1 if that goes on and on, let's say it's the Hundred
2 Years War, is there no opportunity for a court, in
3 your view, to say that this violates, for an American
4 citizen, the elementary due process that the
5 Constitution guarantees?

6 MR. CLEMENT: Well, as I indicated
7 earlier, Justice Breyer, the courts remain open. We
8 recognize the viability of the writ of habeas corpus.
9 There certainly is a challenge that can be brought to
10 the length of the detention at some point. And the
11 courts would be open to hear claims --

12 QUESTION: But your answer to Justice
13 O'Connor, I thought, was, we don't have to worry or a
14 court should not be worrying about the`indefiniteness
15 of the time because it may well be that the President
16 or Congress will at some point say the war in
17 Afghanistan is no longer a matter of concern and,
18 therefore, we don't have to hold the Hamdis.

19 I think that's the only answer that you
20 have given so far to Justice Breyer's question and
21 Justice O'Connor's question. Am I wrong?

22 MR. CLEMENT: Justice Souter, a couple of
23 points. One is, I don't think there is any
24 contradiction with that and my answer to Justice
25 Breyer's question. I mean, you can imagine a

1 situation where the evidence in the Government's own
2 affidavit shows that somebody is only detained with
3 regard to war in Afghanistan. And then you can
4 imagine that that has been signed, sealed and
5 delivered, it's over, the President says so, Congress
6 says so and there is an effort to continue to detain
7 that individual.

8 QUESTION: I can imagine it and I can also
9 imagine that the concern about Afghanistan will go on
10 as long as there is concern about Al Qaeda, and there
11 is no endpoint that we can see at this point to that.
12 So that it seems to me your answer boils down to
13 saying, don't worry about the timing question, we'll
14 tell you when it's over.

15 MR. CLEMENT: With respect, Justice
16 Souter, I continue to think that there may be a role
17 for the courts in dealing with the timing question at
18 some point. I think that would be --

19 QUESTION: I'm taking away from the
20 argument the impression, and please correct me if I'm
21 wrong, that you think there is a continuing role for
22 the courts to examine the reasonableness of the
23 period of detention.

24 MR. CLEMENT: Well, I wouldn't take that
25 away, Justice Kennedy. What I'm saying is there is a

1 continuing but modest role for the courts. The
2 habeas courts will remain open. I mean, the import
3 of one of Justice Souter's questions is that it's
4 already too long and if somebody raised that claim,
5 if there is another petition filed, a direct petition
6 now that Hamdi has counsel that's filed in this
7 claim, and that claim is raised, we would be in court
8 vehemently saying there is no role for the habeas
9 court there. There are troops still on the ground in
10 Afghanistan. It makes no sense whatsoever to release
11 an individual detained as an enemy combatant in
12 Afghanistan while the troops are still on the ground
13 in Afghanistan.

14 QUESTION: But it may make every bit of
15 sense to have an opportunity on the part of that
16 individual, before someone other than an
17 interrogator, to say, I am not the kind of person
18 that they claim I am on the basis of which they are
19 holding me.

20 MR. CLEMENT: Well, again --

21 QUESTION: The alternative is not give him
22 some kind of a hearing or release him.

23 MR. CLEMENT: No, but the alternative is
24 to provide a means of allowing for a military process
25 to go forward. It's not just the interrogator. It's

1 the original screening team on the ground in
2 Afghanistan that, as I said before, released 10,000
3 individuals out of U.S. custody. It's the screening
4 team in Guantanamo and then it is this annual review
5 process that will go forward. Now that is a
6 tremendous amount of process that the executive
7 branch is providing.

8 QUESTION: That we don't have yet. It's
9 still on the drawing board, the annual review.

10 MR. CLEMENT: That's quite correct,
11 Justice Ginsburg, but I would say that for the time
12 being, everything provided to date is more than
13 sufficient.

14 QUESTION: Thank you, Mr. Clement.
15 Mr. Dunham, you have four minutes remaining.

16 REBUTTAL ARGUMENT OF FRANK W. DUNHAM, JR.

17 ON BEHALF OF PETITIONERS

18 MR. DUNHAM: May it please the Court.
19 Mr. Clement is a worthy advocate and he can stand up
20 here and make the unreasonable sound reasonable. But
21 when you take his argument at core, it is, "Trust
22 us." And who is saying trust us? The executive
23 branch. And why do we have the great writ? We have
24 the great writ because we didn't trust the executive
25 branch when we founded this Government. That's why

1 the Government is saying trust us is no excuse for
2 taking away and driving a truck through the right of
3 habeas corpus and the Fifth Amendment that no man
4 shall be deprived of liberty except upon due process
5 of law.

6 We have a small problem here. One
7 citizen. We're not talking about thousands. One
8 citizen caught up in a problem in Afghanistan. Is it
9 better to give him rights or is it better to start a
10 new dawn of saying there are circumstances where you
11 can't file a writ of habeas corpus and there are
12 circumstances where you can't get due process. I
13 think not.

14 I would urge the Court not to go down that
15 road. I would urge the Court to find that citizens
16 can only be detained by law. And here there is no
17 law. If there is any law at all, it is the
18 executive's own secret definition of whatever enemy
19 combatant is. And don't fool yourselves into
20 thinking that that means somebody coming off a
21 battlefield because they've used it in Chicago,
22 they've used it in New York and they've used it in
23 Indiana.

24 The Congress needs to act here. Justice
25 Souter was on point when he was talking about the

1 fact that we're two years into this thing and
2 Congress leaves all the laws on the books that relate
3 to habeas corpus and how a habeas corpus proceeding
4 is supposed to go. They leave the 4001(a) on the
5 books that says no executive detention. But we
6 ignore those laws, we don't enforce them. We don't
7 require Congress to fill a gap.

8 Congress tomorrow could take these
9 military regs and they could say, this is the law, we
10 authorize the executive to detain people and to give
11 them hearings the way the military says, and then it
12 would be lawful.

13 But Congress hasn't done that and I
14 respectfully submit, Your Honor, that until Congress
15 does that, these detentions are not lawful. And I
16 would respectfully ask this Court to step up to the
17 plate and say so.

18 QUESTION: Thank you, Mr. Dunham. The
19 case is submitted.

20 (Whereupon, at 11:19 a.m., the case in the
21 above-entitled matter was submitted.)
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